

Cite as Det. No. 20-0330, 41 WTD 257 (2022)

BEFORE THE ADMINISTRATIVE REVIEW AND HEARINGS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition for Refund of)	<u>D E T E R M I N A T I O N</u>
Assessment of)	
)	No. 20-0330
)	
...)	Registration No. . . .
)	

RCW 82.32.291; WAC 458-20-102: RESELLER PERMIT – MISUSE PENALTY. A reseller permit misuse penalty is applicable to all purchases made without payment of retail sales tax by a software developer holding both a reseller permit and a high technology tax deferral certificate when it makes purchases ineligible for either document and it does not ensure that its vendors properly collect retail sales tax on taxable purchases.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF THE CASE

Gabriella Herkert, T.R.O. – A software developer protests imposition of the reseller [permit] misuse penalty on purchases made without the imposition of retail sales tax while holding both a reseller permit and a [high technology tax] deferral certificate [that it used for machinery and equipment purchases]. We deny Taxpayer’s petition.¹

ISSUE

Under RCW 82.32.291 and WAC 458-20-102 (Rule 102), did the Department of Revenue (Department) properly impose the reseller permit misuse penalty on transactions in which vendors may have failed to impose retail sales tax due to erroneous application of a [high technology] tax deferral certificate?

FINDINGS OF FACT

. . . (Taxpayer) develops, publishes, distributes, sells, and supports video games and other software products and related content. Taxpayer also sells, distributes, and supports third-party video games. Taxpayer’s headquarters are in . . . , Washington. The Department granted Taxpayer a [high technology] tax deferral certificate^[2] for the purchase of particular items in connection with

¹ Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

² [See generally chapter 82.63 RCW and WAC 458-20-24003.]

its manufacturing operations. In 2010, the Department granted Taxpayer a reseller permit, and Taxpayer has held a reseller permit since then. Taxpayer made purchases for resale as well as purchases eligible for the [high technology] tax deferral. Taxpayer purchased prototypes, consumables, and other taxable items that were not for resale and not eligible for tax deferral under the [high technology tax deferral] certificate.

The Department's Audit Division (Audit) reviewed Taxpayer's books and records for the tax period January 1, 2012, through December 31, 2015. Taxpayer provided a printout of its transactions that included a retail sales tax paid column. Taxpayer and Audit agreed that any transaction on the printout that showed retail sales tax paid would be treated as if that retail sales tax was in fact paid Audit and Taxpayer also agreed to treat any vendor that imposed retail sales tax as consistently imposing it to Taxpayer's credit without additional documentation. For vendors on Taxpayer's printout that showed neither retail sales tax paid on a particular transaction nor retail sales tax paid on other transactions which were not eligible for deferral, Audit requested invoices showing retail sales tax paid. Taxpayer did not provide the invoices. Audit issued . . . , in the amount of \$. . . , which included \$. . . in tax, \$. . . in penalties, and \$. . . in interest. Audit issued [a letter], clarifying that the reseller permit misuse penalty was imposed on retail purchases for which Taxpayer did not show . . . retail sales tax paid that was owed.

Taxpayer timely appealed. Taxpayer initially disputed the appropriateness of imposing retail sales tax on certain transactions, including the purchase of prototypes, consumables, and purchases made using a purchasing card. Subsequently, Taxpayer limited its challenge to the imposition of the reseller permit misuse penalty. Taxpayer contends that vendors failed to impose retail sales tax because they previously obtained a copy of Taxpayer's [high technology] tax deferral certificate and not because Taxpayer held a reseller permit that could be verified electronically. Taxpayer contends that because the underlying issue in determining the appropriate application of a reseller permit is the classification of the transaction as either wholesale or retail, transactions that are always retail albeit exempt from imposition of retail sales tax for other purposes cannot be subject to the penalty for reseller permit misuse if those transactions ultimately do not prove to be exempt.

ANALYSIS

All Washington sales of tangible personal property to consumers are subject to retail sales tax unless the sales are otherwise exempt from tax. RCW 82.08.020(1); RCW 82.04.050(1). Retail sales tax does not apply to sales for resale, and a buyer may use a reseller permit when making such purchases. RCW 82.04.050(1)(a)(i); RCW 82.04.060; Rule 102(6).

RCW 82.32.291 requires the Department to impose a 50 percent penalty for improper use of a reseller permit and provides, in part:

(1) Except as otherwise provided in this section, if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail without payment of sales tax that was legally due on the purchase, the department must assess against that buyer a penalty of fifty percent of the tax due, in addition to all other taxes, penalties, and interest due, on the improperly purchased item or service.

...

(3) A buyer that purchases items or services at retail without payment of sales tax legally due on the purchase is deemed to have improperly used a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase the items or services without payment of sales tax and is subject to the penalty in subsection (1) of this section if the buyer:

(a) Furnished to the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation authorized under RCW 82.04.470 to avoid payment of sales tax legally due on the purchase; or

(b) Made the purchase from a seller that had previously used electronic means to verify the validity of the buyer's reseller permit with the department and, as a result, did not require the buyer to provide a copy of its reseller permit or furnish other documentation authorized under RCW 82.04.470 to document the wholesale nature of the purchase. In such cases, the buyer bears the burden of proving that it did not improperly use its reseller permit to make the purchase without payment of sales tax.

The Department adopted Rule 102 to administer RCW 82.32.291. Rule 102(9) mirrors the language in RCW 82.32.291(1) with respect to the improper use of a reseller permit, and states that the penalty can be imposed even when the buyer was not intending to evade paying retail sales tax. Rule 102(9); Det. No. 14-0404, 34 WTD 337, 338 (2015).

RCW 82.32.291(1) requires the imposition of the penalty “if any buyer improperly uses a reseller permit number, reseller permit, or other documentation authorized under RCW 82.04.470 to purchase items or services at retail” This clause provides that the buyer must improperly use the permit for the penalty to apply.

Taxpayer made purchases on which it did not pay retail sales tax even though retail sales tax was due. [Retail sales tax was due] because they were retail purchases not eligible for tax deferral under Taxpayer’s [high technology tax] deferral certificate or because the purchases were not made for resale. Taxpayer does not dispute it made retail purchases for which it did not document that retail sales tax had been paid. [The question is whether Taxpayer used its reseller permit improperly under RCW 82.32.291(3)(a) or (b).]

Under subsection RCW 82.32.291(3), buyers are deemed to have improperly used their permit under two circumstances, set forth in RCW 82.32.291(3)(a) and (3)(b). Buyers must either: (a) furnish “the seller a reseller permit number, a reseller permit or copy of a reseller permit, or other documentation authorized under RCW 82.04.470 to avoid payment of sales tax legally due on the purchase;” or (b) “purchase from a seller that had previously used electronic means to verify the validity of the buyer’s reseller permit with the department and, as a result, did not require the buyer to provide a copy of the reseller permit” RCW 82.32.291(3).

Here, we have no evidence that the taxpayer furnished its reseller permit to the sellers to avoid payment of sales tax legally due on the purchases at issue; therefore, RCW 82.32.291(3)(a) does not apply. Next, we address whether RCW 82.32.291(3)(b) applies.

Det. No. 15-0284, 34 WTD 595 (2015), explains the taxpayer's burden under RCW 82.32.291(3)(b), as follows:

For imposition of the penalty under RCW 82.32.291(3)(b), “the **buyer bears the burden of proving that it did not improperly use its reseller permit** to make the purchase without payment of sales tax.” (Emphasis added.) WAC 458-20-102 adds the following about this burden:

[T]he buyer bears the burden of proving that the purchases made without payment of sales tax were qualified purchases or the buyer remitted deferred sales tax directly to the department. The buyer not realizing that sales tax was not paid at the time of purchase is not a reason for waiving the penalty.

WAC 458-20-102(9)(a)(ii). This provision also requires the taxpayer to show that its vendor did not previously look up its reseller permit information electronically under RCW 82.32.291(3)(b). Unless otherwise mandated by statute or due process principles, Washington applies the preponderance of evidence standard in administrative proceedings. [citations omitted]. Because the legislature did not specify the burden of proof that is required for RCW 82.32.291(3)(b), we conclude that the burden is on the taxpayer to prove that its vendors did not previously look up its permit by a preponderance of the evidence.

34 WTD 595, at 600 (emphasis added).

RCW 82.32.291(3)(b) relates to the situation where the taxpayer and the seller have a previous selling relationship, and the seller did not charge retail sales tax on purchases because of a prior electronic verification of the buyer's reseller permit. *Id.* In such a situation, the seller would be selling property under the assumption that the sale is for resale in the regular course of business. For imposition of the penalty under RCW 82.32.291(3)(b), “the buyer bears the burden of proving that it did not improperly use its reseller permit to make the purchase without payment of sales tax.” In 34 WTD 595, the Department held that, “[i]t is the taxpayer's burden to show that these vendors, from whom it regularly purchased items at retail without paying retail sales tax, did not previously use electronic means to look up the taxpayer's reseller permit.” *Id.*

In 34 WTD 595, the taxpayer was assessed deferred retail sales tax on purchases from vendors from whom it had regularly purchased items at retail without paying retail sales tax, and was assessed the reseller permit misuse penalty. The taxpayer in 34 WTD 595 asserted that the reseller permit misuse penalty did not apply because it did not represent to those vendors that the purchases were made for resale and exempt from sales tax on that basis. *Id.* The taxpayer in that determination also stated that it did not know whether the vendors obtained its reseller permit electronically through the Department's database. *Id.* Taxpayer in this case, like the taxpayer in 34 WTD 595, asserts that it does not know the basis upon which its vendors failed to charge retail sales tax. Taxpayer states that because it previously used [a high technology tax] deferral certificate, it is as

likely that those vendors failed to collect retail sales tax because they continued to rely on the previously offered [high technology tax] deferral certificate, even though it was either expired or inapplicable to the particular purchase, and not because they verified Taxpayer's reseller permit electronically. Taxpayer provides no evidence, other than mere supposition, as to the reason any vendor did not charge retail sales tax.

In Det. No. 16-0307, 36 WTD 291 (2017), we held that a taxpayer has the responsibility to correct sellers who do not collect retail sales tax on retail sales. Taxpayer did not correct sellers that failed to impose retail sales tax on transactions outside the [parameters of the high technology tax] deferral certificate and not purchased for resale. Here, we do not have evidence that vendors erroneously relied on Taxpayer's [high technology tax] deferral certificate when failing to impose retail sales tax. We do not have evidence to establish that Taxpayer did not provide a reseller permit to any vendor or that Taxpayer's vendors did not electronically verify Taxpayer held a valid reseller permit before making sales to Taxpayer without imposing retail sales tax. The purpose of RCW 82.32.291(3)(b) is to require the purchaser to disclose to the seller the true nature of the sale when the seller may be under a false assumption on the nature or purpose of the sale. *See* Det. No. 15-0294, 36 WTD 174, 177 (2017). Taxpayer was on notice as to the possibility that the vendors would not charge retail sales tax. When the vendors failed to charge retail sales tax, Taxpayer had the obligation to inform the vendors of the error and correct the problem.³

Taxpayer has not met its burden to show that the vendors did not look up Taxpayer's reseller permit electronically. Taxpayer did not inform vendors failing to charge retail sales tax that its [high technology tax] deferral certificate was expired or inapplicable. Furthermore, Taxpayer did not inform vendors that it was making retail purchases it was not reselling. Taxpayer has not met its burden of proving that its failure to pay retail sales tax on purchases to which the [high technology tax] deferral certificate did not apply, and which were not purchased for resale did not result from its improper use of its reseller permit. Therefore, the penalty under RCW 82.32.291(3)(b) applies.

DECISION AND DISPOSITION

Taxpayer's petition is denied.

Dated this 9th day of December 2020.

³ Taxpayer is effectively arguing that, in the absence of evidence whether its vendors failed to charge it sales tax because of an expired [high technology deferral tax] certificate or the misuse of a reseller permit, the Department should assume that its failure to pay sales tax was due to its [high technology deferral tax] certificate expiring. It is not the Department's burden to prove the reason why Taxpayer failed to pay sales tax. It is the Taxpayer's burden. *See* RCW 82.32.291(3)(b). We hold that Taxpayer failed to meet this burden.